IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

WEDNESDAY, THE 11TH APRIL 2007 / 21ST CHAITHRA 1929

CRL.A.No. 1468 of 2006()

SC.907/2005 of ADDL. SESSIONS FAST TRACK COURT (ADHOC) III, PALAKKAD
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APPELLANT: ACCUSED:

V. VENUGOPAL, S/O.PONNUSWAMY @ NARAYANAN
AGED 51 YEARS, THEMBARANADA, KANAKKAMBARA,
THEKKEDESAM.

BY ADV. SRI.P.VIJAYA BHANU
SRI.M.REVIKRISHNAN

RESPONDENT: COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.K.C.SANTHOSH KUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 05/03/2007, THE COURT ON 11/04/2007 DELIVERED THE FOLLOWING:

J.B.KOSHY & T.R.RAMACHANDRAN NAIR, JJ.

Crl.Appeal No.1468 OF 2006

Dated April, 2007

JUDGMENT

Koshy,J.

A 60 year old Agriculturist called Kesavan was murdered on 26.4.2004 at about 7.30 p.m. and accused who is his brother-in-law was convicted for offence punishable under Section 302 of the Indian Penal Code. The deceased Kesavan is the husband of PW4 Nachikutty, sister of the accused. The paddy fields of the accused is lying adjoining to the paddy field of Nachikutty and is lying in a higher level. Water for cultivation in the paddy fields of the wife of the deceased has to be taken through the field of the accused and there has been disputes between the accused and deceased with regard to the diversion of water for cultivation. On 26.4.04 at about 7.30 p.m. when the deceased Kesavan and PW1 Sivaswamy Gaundar were walking through Kanakkampara – Themparamada road, the accused stopped the deceased and made an attempt to stab him with MO1 knife. The deceased prevented the same and ran away from there. The accused followed him and again stopped him, stabbed at his chest, neck and left hand with MO1 knife and thereby inflicted injuries on the body of the deceased. The deceased succumbed to the injuries.

2. PW1 is a neighbour who knows the accused and deceased well. He is a seventy five year old labourer doing

the work of maintaining cows. He gave the First Information Statement in terms of the prosecution case. It was marked as Ext.P1. However, during oral evidence he gave a different version. According to him, the incident occurred on the road in the evening and he was coming from Kanakkampara to Themparamada. He further deposed that nobody was with him at that time. Deceased Kesavan was walking ahead and at that time the incident occurred. He further stated that he is not aware who killed him. He has not seen the accused stabbing the deceased. He further stated that lot of people were standing at the place where body of Kesavan was lying and he was also standing there. Then Police arrived there and he gave statement to the police at that time. He also stated that he never went to police station and Ext.P1 is not given by him at the police station. Since he has stated contrary to Ext.P1 statement, he was declared hostile and he was cross examined. Then he admitted that he has stated to the police what he has seen and whatever he stated was written down by the police. The police read it out to him and then only he signed it. He also stated that contents of Ext.P1 are true. He deposed as follows:

He further stated that immediately after his arrival, his employer (PW6) reached there and he told him what he has seen there. Later he stated that after seeing the incident, he ran away with fear. He deposed as follows:

In cross examination by accused he stated that he cannot read and write and he is not aware what is written in Ext.P1. Nobody has read it out to him. He has signed the same at the Themparamada road at 9-9.30 a.m. He has not stated anything at the time of signing the same. He was asked to sign and he signed it. At the time when signature was put in Ext.P1, many others were present in the road. There is no other eye witness to the incident.

3. PW2, brother of the deceased, PW3, son of the deceased, PW4, wife of the deceased were examined to prove the motive. On going through the evidence, it can be very clearly stated that there was dispute regarding the distribution of water and it is also stated by many witnesses that earlier the accused stabbed son of the deceased and after that incident they were not in talking terms. PW4 also stated that there were disputes regarding share in the property and her deceased father promised her to give her share and she had seen accused stabbing her son. She further stated that accused and deceased used to drink liquor and deceased used to beat her after drinking. From the evidence adduced in this case, it is very clear that prosecution was able to prove motive on the part of the accused. Existence of strong motive on the part of the accused is not enough to prove that he is guilty of the crime. It is settled law that existence of motive is an important link, but, mere existence of motive will not make a person guilty of the crime unless there are other evidence or circumstances to show that he committed the crime. PWs 5 and 6 are attestors to the inquest report, but, they have not seen the incident. PW6 who is the employer of PW1 is also stated that PW1 informed him about

the death of Kesavan, but, no question was asked to PW6 about the substance of information given by PW1 and whether PW1 disclosed that whether Kesavan was killed by the accused. PWs 7, 8, 9 and 10 are attestors to ExtP4 scene mahazar, Ext.P5 seizure mahazar and all of them turned hostile. Their evidence will not connect the accused with the crime.

4. The only evidence, other than the evidence of PW1, to connect the accused with the crime is the alleged seizure of MO1 knife by Ext.P12 mahazar. According to the police, on the basis of the information given by the accused MO1 knife was recovered from a hole in the canal bund and he stated that if he was taken there he can take out the knife. His confession is as follows:

However, there is no authorship of concealment. It is not stated by him that he concealed the same. From the

disclosure what can be meant is that he has got information that MO1 knife is kept in the hole in the canal bund and if he is taken there, he will take out the knife. That evidence by itself will not connect the accused with the crime, but, it is admissible under Section 27 of the Evidence Act to the extent that accused knew the place where weapon was concealed. The Apex Court in ***Amitsingh Bhikamsingh Thakur*** v. ***State of Maharashtra*** ((2007) 2 SCC 310) held that "facts discovered" for the purpose of Section 27 of the Evidence Act is not restricted to physical objects. The knowledge of the accused in relation to the place of concealment of the weapon is a relevant fact and is an incriminating circumstance against the accused. Here, recovery of the weapon at the instance of the accused constitutes one of the links in the chain of circumstantial evidence. MO1 was sent for chemical examination. Ext.P23 Chemical Examination Report shows that the blades of the knife was moderately stained with blood. The result would also show that human blood was detected in MO1 knife. The group of the blood was not ascertained due to insufficient quantity. But, it can be seen that MO1 is stained with human blood. On the basis of the confession statement PW21 recovered MO8 shirt worn

by the accused at the time of commission of the offence from the house of Chandran, S/o.Aru, bearing house NO.VII/499 of Nalleppilli panchayath as per Ext.P5 seizure mahazar. Ext.P5(a) is the extract of the confession reiterated in Ext.P5 seizure mahazar. PWs. 9 and 10 are the attesters to Ext.P5 seizure mahazar. PW21 stated that as per Ext.P5(a) disclosure statement and as lead by the accused he recovered MO8 shirt from the top of the asbestose roof of the bath room attached to the above said house of Chandran. PWs. 9 and 10 have admitted their signatures in Ext.P5 seizure mahazar, but, they deposed that they did not see the actual recovery. They were declared hostile. Evidence of witnesses as a whole prove that shirt was recovered at the instance of the accused. Similarly, the recovery of MO1 knife and recovery of MO8 shirt also show the knowledge of the accused where the shirt was. There is no serious cross examination to establish that MO8 shirt is not belonging to the accused. Ext.P23 report shows that MO8 shirt also contained human blood stains. Even Ext.P12 mahazar regarding the recovery was attested by PWs 14 and 15 and both of them turned hostile. Even if the attestors to the recovery mahazar are turned hostile, recovery can be accepted as admissible

under section 27 of the Evidence Act on the basis of the investigating officer's evidence. Here, recovery is also proved subsisting by photos and PWs14 & 15 admitted that they singed the recovery mahazar.

5. PW11 doctor conducted postmortem and issued Ext.P8 postmortem certificate. The evidence of PW11, the doctor who conducted the postmortem examination on the body of the deceased Kesavan, would show that there were 10 ante-mortem injuries on the body of the deceased. He stated that out of the said 10 injuries, six injuries were incised penetrating injuries. They were injury Nos.1,2,3,4,6 and 7 in Ext.P8 postmortem certificate. He stated that the deceased died due to the incised penetrating injuries sustained in chest. MO1 knife was shown to him in the court and he stated that penetrating incised wounds mentioned in Ext.P8 certificate could be caused with MO1 knife. Thus, it is clear from the evidence that the incised penetrating injuries seen on the body of the deceased were caused with MO1 knife and those incised penetrating injuries were the cause of death of the deceased. Doctor also stated that majority of the injuries can be caused in a struggle.

6. It was argued that PW1 is a Tamilian and as stated by him he signed Ext.P1 without knowing the contents. However, trial Judge who has seen PW1 and examined him observed as follows:

> "Of course, it is true that PW1 is a native of the State of Tamilnadu and so he speaks Tamil. But, he has stated before the court that for the last 50 years he has been residing in Meenakshipuram at Kollenkode a place withing State of Kerala. Even though, PW1, has a Tamil ascent, he could understand Malayalam very well and able to convery his ideas in Malayalam linked with Tamil words. PW6, the employer of PW1 has stated that, PW1 knows Malayalam. In this juncture it is important to note that I have seen him in the box and heard him deposing before me. His way of stating things and expressing the matters before the court, I am fully convinced that PW1 could understand Malayalam well and able to express things in Malayalam. The deposition recorded by me was read out to him and he admitted it to be correct."

In chief examination he stated that Ext.P1 was given by him and the contents therein are correct. Thereafter, he deposed that he has not seen the incident and he has not seen the accused stabbing the deceased. Throughout in his deposition he never stated that he has seen the accused stabbing the deceased. After declaring hostile, he stated

that contents of Ext.P1 was correct. He further deposed that what he stated before the police is the same what he has seen. He signed Ext.P1 after it was read out to him and understanding the same and he has no objection for the same. After seeing the incident he ran away with fear. The F.I. Statement cannot be taken as substantive evidence. In **Baldev Singh** v. **State of Punjab** ((1990) 4 SCC 692) at paragraph 5 the Apex Court held as follows:

> "5. It is seen from the judgment of the High Court that though PW10 in his chief examination has supported the prosecution version in all its material particulars has given a complete go-by and struck a death knell to the prosecution in his cross-examination stating that due to darkness he could not identify the culprits. The High Court was inclined to place reliance on his evidence on the ground that this witness in his statement before the police, evidentally referring to the statement recorded under Section 161 of the Code of Criminal Procedure during the investigation as well in the first information report Ex.P.O., has narrated all the relevant facts and had not whispered in those statements that he could not identify the appellant due to darkness. This reasoning of the High Court in our view is erroneous. Needless to streess that the statement recorded under Section 161 of the Code of Criminal Procedure shall not be used for any purpose except to contradict a witness in the manner prescribed in the proviso to Section 162(1) and that the

> first information report is not a substantial piece of evidence."

Even though F.I. Statement is not a substantial piece of evidence, it is very important in a criminal case as it is the first version of the incident after commission of crime. Here, F.I. Statement was given without any delay. PW1 admitted that he had given it and put his thump impression after understanding the contents. Though he denied in the oral deposition that he has seen the accused inflicting injuries on the deceased as stated in Ext.P1 and he signed Ext.P1 without understanding it, in cross examination he stated that contents of Ext.P1 are correct. It is settled law that F.I. Statement cannot be a substantial piece of evidence. But, here, it was not admitted by the witness that contents of F.I. Statement was correct, that what he had seen was told to the police, that police read over the statement to him and after understanding he put his signature. Therefore, apart from proving Ext.P1, PW1 deposed that the contents in the statement was correct. He is a village witness, a poor agricultural worker. He gave the statement in his simple way to the police. Thereafter pressure made on to him and a different version was given in deposition, but,

prosecution was succeeded in cross examination to make him say that contents of Ext.P1 are correct. Therefore it cannot be stated that Ext.P1 and its contents can be ignored as valueless. The hyper-technicalities in evidence should not be allowed to divert the court from sifting evidence and a rational approach has to be adopted. In **Gura Singh** v. **State of Rajasthan** ((2001) 2 SCC 205) it was held that hostile witness can be believed to a certain extent and it cannot be discarded. It is now settled law that evidence of hostile witness need not be discarded. By declaring a witness hostile, prosecution gets an opportunity to cross examine. Thereafter it is for the court to sift the evidence and find its correctness. Here in cross examination he unequivocally deposed that contents of Ext.P1 was given by him to police and what he has actually seen was disclosed to the police. That part can be accepted and even though evidence of PW1 is shattered, part of his deposition can be treated as substantial evidence and Ext.P1 can be used for corroboration of that part. Here, apart from the contents in Ext.P1 which is stated to be true by PW1, considering the existence of strong motive coupled with recovery of blood stained MO8 shirt and recovery of MO1 knife on the basis of confession

made by the accused, we are of the opinion that injuries were caused by the accused by using MO1 knife and as a result death occurred.

7. Now, the question is whether the appellant is guilty of offence punishable under section 302 of the Indian Penal Code. As we have seen that PW1 became hostile, even though there was recovery of blood stained shirt of the accused and MO1 knife, there is no direct evidence regarding the manner in which offence was committed. There is no evidence to show who started the incident. Quarrel might have been started all of a sudden. Though related, both were inimical with longstanding disputes, but, used to consume liquor. Even though fatal injuries were inflicted on the accused, other injuries suggest that there was struggle and in that struggle or fight, deceased got fatal injuries. Only one injury was fatal. Considering all these circumstances, especially when PW1, the only eye witness, turned hostile, though there is clear evidence to connect the accused with the crime, we are of the opinion that accused can be convicted only under Section 304 part I as injuries were inflicted on the deceased which are likely to cause death in the

ordinary course even though there is no evidence of premeditation. In the above circumstances, conviction of the appellant under Section 302 IPC is set aside and he is convicted under Section 304 Part I and sentenced to undergo rigorous imprisonment for seven years with a fine of Rs,20,000/-. If the fine amount is not paid, he should undergo imprisonment for another six months. If fine amount is paid, Rs.15,000/= should be paid to PW3, wife of the deceased.

The appeal is allowed in part.

J.B.KOSHY
JUDGE

T.R.RAMACHANDRAN NAIR
JUDGE

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